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**Honorable Salvador Mendoza, Jr.**

9 **UNITED STATES DISTRICT COURT**  
10 **EASTERN DISTRICT OF WASHINGTON**

11 JAMES BLAIS and GAIL BLAIS,  
12 Plaintiffs,

13 v.

14 ROSS HUNTER, in his official  
capacity of Secretary of Washington  
15 State Department of Children, Youth,  
and Families,

16 Defendant.  
17  
18  
19  
20  
21  
22

NO. 2:20-cv-00187-SMJ

DEFENDANT'S RESPONSE  
TO PLAINTIFFS' MOTION  
FOR PRELIMINARY AND  
PERMANENT  
INJUNCTION

**NOTED FOR HEARING:**  
**BY**  
**VIDEOCONFERENCE:**  
**7/16/2020, AT 11:00 A.M.**

**WITH ORAL ARGUMENT**

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## I. INTRODUCTION

Defendant Ross Hunter, in his official capacity as the Secretary of Washington State's Department of Children, Youth, and Families (DCYF), respectfully requests that this Court deny Plaintiffs' Motion for Preliminary and Permanent Injunction, ECF No. 3.

Plaintiffs' request for this extraordinary remedy should be denied because they have failed to demonstrate that (1) there is a likelihood they will succeed on the merits, (2) there is a likelihood they will suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest.

## II. STATEMENT OF FACTS

### A. Introduction

The gravamen of Plaintiffs' Complaint for Declaratory and Injunctive Relief (ECF No. 1), filed on May 22, 2020, alleges that DCYF refused to act on their application to become licensed foster parents and failed to state when it will make a decision, failures they assert are unconstitutional. *See* ECF No. 1 ¶ 2. From this premise, which is no longer accurate because DCYF has since denied their application, Plaintiffs ask this Court to require DCYF to act timely on their application and to enjoin DCYF from enforcing its policies they claim conflict with their "sincerely held religious beliefs concerning sexual orientation or gender identity." ECF No. 1 at 29, ¶¶ 2, 3.

1 Plaintiffs submitted their application to DCYF in January 2020.  
 2 Declaration of Patrick Sager (Sager Decl.) ¶ 30. On June 16, 2020, after  
 3 concluding its thorough investigation, DCYF timely sent them notice of its  
 4 decision to deny their application for a foster care license. Sager Decl., Ex. 4. As  
 5 set forth more fully below, DCYF's decision is supported by the facts and the  
 6 relevant licensing rules, which require that a foster care applicant must provide  
 7 adequate support related to a child's sexual orientation or gender identity. Wash.  
 8 Admin. Code § 110-148-1520(6)-(7).

9 **B. James and Gail Blaises' Application for a Foster Care License**

10 On January 3, 2020, DCYF's Interstate Compact on the Placement of  
 11 Children (ICPC) Unit received a request from the State of Idaho to consider  
 12 James and Gail Blais as possible placements for their great granddaughter, H.V.<sup>1</sup>  
 13 Declaration of Maya Brown (Brown Decl.) ¶ 16. The ICPC, codified in chapter  
 14 26.34 of the Revised Code of Washington, is an interstate compact between states  
 15 to help place children in the custody of child welfare agencies with safe  
 16 caregivers who live in another state. Brown Decl. ¶ 1. The Idaho Department of  
 17 Health and Welfare also requested that Mr. and Mrs. Blais have a foster home  
 18

19 <sup>1</sup> H.V. is alternately referred to by Plaintiffs as their great-granddaughter,  
 20 ECF No. 1, ¶¶ 44, 56, and their granddaughter. ECF No. 4, ¶ 1. The records  
 21 submitted by the State of Idaho also refer to the child as Plaintiffs' great-  
 22 granddaughter, and DCYF will refer to her as such.

1 study, and Mr. and Mrs. Blais thereafter submitted a foster care application on  
2 January 10, 2020. Sager Decl. ¶ 30.

3 Mr. and Mrs. Blais's foster care application was assigned to Foster Care  
4 Licensur Patrick Sager. Sager Decl. ¶ 30. In the foster care licensing process, the  
5 Foster Care Licensur evaluates whether the applicants meet the minimum  
6 licensing requirements in chapter 110-148 of the Washington Administrative  
7 Code. Sager Decl. ¶ 2. The goal is to provide foster children safe homes that will  
8 adequately support them, in the present and in the long term, while they are away  
9 from their parents. Declaration of Pamela McKeown (McKeown Decl.) ¶ 8.  
10 Mr. Sager inspected Mr. and Mrs. Blais's home on January 17, 2020 and, during  
11 an interview that same day, asked a variety questions found in DCYF's Interim  
12 Family Home Study Guide. Sager Decl. ¶ 31. Of concern were their responses to  
13 questions designed to determine how they would support a foster child who  
14 identifies or may identify as lesbian, gay, bisexual, transgender, or questioning  
15 (LGBTQ+). Sager Decl. ¶ 31. For example, they indicated that they would be  
16 unwilling to support (a) counseling not consistent with their own religious  
17 beliefs; (b) hormone therapy, even if it was medically necessary or  
18 recommended; (c) boys wearing girls' clothing and vice versa; or (d) using a  
19 foster child's preferred name, if it was different from their given name. Sager  
20 Decl. ¶ 31. This is significant because licensing rules require that a foster parent  
21  
22

1 provide support to foster children, including regarding their sexual orientation  
2 and gender identity.

3 Mr. Sager provided Mr. and Mrs. Blais educational information  
4 concerning the importance of supporting foster children who identify or may  
5 identify as LGBTQ+. Sager Decl. ¶ 34. On March 25, 2020, Mr. Sager and  
6 DCYF's Regional LGBTQ+ Lead, Licensor Carissa Stone, met with Mr. and  
7 Mrs. Blais to further discuss the importance of foster youth who identify or may  
8 identify as LGBTQ+ having safe, supportive, and affirming homes and the  
9 trauma foster children endure when they experience family rejection. Sager  
10 Decl. ¶ 37; Declaration of Carissa Stone (Stone Decl.) ¶ 12. Although cordial,  
11 Mr. and Mrs. Blais reaffirmed that they were unwilling to meaningfully change  
12 their positions—they would only provide medical and therapeutic services that  
13 were consistent with their religion, even if they were not affirming of a child's  
14 sexual orientation or gender identity. Sager Decl. ¶¶ 37-38. Thereafter, Mr. Sager  
15 offered Mr. and Mrs. Blais an additional online training opportunity. Sager  
16 Decl. ¶ 39.

17 Consistent with its practice when evaluating whether to issue a foster care  
18 license, DCYF sent questionnaires to Mr. and Mrs. Blais's five adult children,  
19 and received responses from two. Sager Decl. ¶¶ 33, 40. One adult child replied,  
20 "I have different religious views than my father and I wouldn't necessarily want  
21 that environment for my child for the long term. I raised my [child] that no  
22

1 religion is perfect and not having religion in your life is fine as well. It's  
 2 ultimately an individual's choice and my father has stringent religious views  
 3 concerning same-sex marriages, inter-racial marriages and relationships in  
 4 general." Sager Decl. ¶ 33. This response confirmed Mr. Sager's existing concern  
 5 about Mr. and Mrs. Blais: that they would not provide adequate support to a foster  
 6 child in the long term. Sager Decl. ¶ 33.

7 On June 16, 2020, DCYF timely sent Mr. and Mrs. Blais notice of the  
 8 denial of their foster care license application, which explains DCYF's decision  
 9 and details their appeal rights. Sager Decl. ¶ 41; Ex. 4.

#### 10 **C. LGBTQ+ Children in Foster Care**

11 DCYF's support of LGBTQ+ children in its care is empirically based, both  
 12 in terms of the number of children who identify as such and the significant risks  
 13 they face when they do not receive adequate family support.

14 A greater percentage of foster children identify as LGBTQ+ than in the  
 15 general population. In a recent small survey, 10% of Washington foster youth  
 16 identified as LGBTQ+; other researchers have estimated that as many as 20% to  
 17 40% of foster youth identify as LGBTQ+. Declaration of Dae Shogren (Shogren  
 18 Decl.) ¶ 11-13; Declaration of Ross Hunter (Hunter Decl.) ¶¶ 8, 16; Exs. 2, 3. In  
 19 contrast, only five percent of Washington State's general population identifies as  
 20 LGBTQ+. Shogren Decl. ¶12.

1 Children grow and mature while they are placed with foster parents and a  
2 child's needs are not always readily apparent when they are initially placed.  
3 Hunter Decl. ¶ 20; McKeown Decl. ¶ 31; Brown Decl. ¶ 14. In a 2015 survey of  
4 50 Washington LGBTQ+ foster children, nearly half reported entering foster care  
5 for reasons unrelated to their LGBTQ+ identity and, due to their young age when  
6 they entered foster care, most of these 23 young people were not aware of their  
7 LGBTQ+ identity when they entered foster care. Shogren Decl. ¶ 14, Ex. 2. They  
8 reported experiencing mistreatment, rejection, and disrespect as they matured and  
9 their identity emerged. *Id.*; *see also* Hunter Decl. Ex. 2.

10 Family rejection poses a significant danger to children who identify as  
11 LGBTQ+, and can be life-threatening; in one study, lesbian, gay, and bisexual  
12 youth who experienced family rejection were 8.4 times more likely to report  
13 having attempted suicide, 5.9 times more likely to report high levels of  
14 depression, and 3.4 times more likely to use illegal drugs. Shogren Decl. ¶ 17,  
15 Ex. 4 at 346; *see also* Shogren Decl. Ex. 7; Hunter Decl. Ex. 2. Conversely,  
16 family acceptance related to a youth's LGBTQ+ identity has a lasting and  
17 dramatically protective influence on the health and well-being of those young  
18 people. Shogren Decl. ¶ 19, Exs. 5, 8, 10.

19 In recognition of the disparities faced by foster children who identify, or  
20 may identify, as LGBTQ+, DCYF adopted Policy 6900 on July 1, 2018. Shogren  
21 Decl. ¶¶ 18-20; McKeown Decl. ¶ 23; Brown Decl. ¶ 5. The goal of this Policy  
22



1 is to provide foster children safe and affirming care so that children who may  
 2 identify as LGBTQ+ are not discriminated against and maintain emotional and  
 3 physical health. Shogren Decl. ¶¶ 6, 21, 27; McKeown Decl. ¶ 24. Policy 6900  
 4 requires DCYF staff to: (a) evaluate whether a foster parent will use and allow  
 5 children to use a different name, pronoun, and gender that reflects their identity  
 6 when making decisions and referrals for services; (b) evaluate whether a foster  
 7 parent will allow children and youth to express their gender identity through  
 8 clothing, hairstyle, and mannerisms; and, (c) prior to each placement, discuss the  
 9 caregiver's ability to meet and support the child or youth's needs, including their  
 10 safety and well-being in regard to the perceived or known LGBTQ+ identity.  
 11 McKeown Decl. ¶ 23.

12 In order to achieve DCYF's goal of having foster children placed in homes  
 13 that will support their current and possible future LGBTQ+ identity and to protect  
 14 them from known and potential harms, DCYF will only license foster parents  
 15 who can provide safe and affirming homes. Hunter Decl. ¶¶ 16, 21. Doing  
 16 otherwise denies the humanity and identity of these children. Hunter Decl. ¶ 21.

### 17 III. LEGAL DISCUSSION

#### 18 A. Plaintiffs' Request for Injunctive Relief Should Be Denied

19 As an initial matter, it should be noted that, although Plaintiffs' motion is  
 20 styled as one for "preliminary and permanent injunction", their argument is  
 21 limited to a request for a preliminary, and not a permanent, injunction. As a  
 22

1 consequence, Defendant's Response is limited accordingly.

2 A preliminary injunction is a matter of equitable discretion and is "an  
3 extraordinary remedy that may only be awarded upon a clear showing that the  
4 plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*,  
5 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). A preliminary  
6 injunction may only be issued if a party has demonstrated (1) a likelihood of  
7 succeeding on the merits, (2) a likelihood of suffering irreparable harm in the  
8 absence of preliminary relief, (3) that the balance of equities tips in his or her  
9 favor, and (4) that an injunction is in the public interest. *Disney Enters., Inc. v.*  
10 *VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). When the government is a  
11 party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073,  
12 1092 (9th Cir. 2014).

13 Plaintiffs cannot show a likelihood of success on the merits because they  
14 (1) lack standing to bring the claims they raise, given that they have failed to  
15 exhaust their administrative remedies and their claims are not ripe, (2) have not  
16 suffered an injury in fact, (3) have not demonstrated that DCYF has violated their  
17 free exercise of religion, and (4) have not been denied equal protection.  
18 Likelihood of success on the merits is "the most important" factor; if a party  
19 seeking injunctive relief fails to meet this "threshold inquiry," the court need not  
20 consider the other factors. *Disney*, 869 F.3d at 856. There are at least five reasons  
21 Plaintiffs' claims are unlikely to succeed on the merits.  
22

1        *First*, Plaintiffs have failed to exhaust their administrative remedies as  
 2 required by law. As a consequence, their claims are not ripe, nor have they  
 3 suffered an injury in fact, as demonstrated by Defendant’s motion to dismiss.  
 4 ECF No. 17. Until Plaintiffs exhaust the requisite administrative remedies, their  
 5 claims are not ripe and this Court is not in a position to address, much less  
 6 adjudicate, their claims. “[R]ipeness is peculiarly a question of timing, designed  
 7 to prevent the courts, through avoidance of premature adjudication, from  
 8 entangling themselves in abstract disagreements.” *Stormans, Inc. v. Selecky*  
 9 (*Stormans I*), 586 F.3d 1109, 1122 (9th Cir. 2009) (internal quotations omitted).  
 10 The courts’ role is to adjudicate actual cases or controversies, not issue advisory  
 11 opinions or declare rights in a hypothetical case. *Id.*

12        *Second*, Plaintiffs have not suffered an injury in fact. In order to satisfy  
 13 Article III’s “case or controversy” requirement, a plaintiff “must show (1) it has  
 14 suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or  
 15 imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the  
 16 challenged action of the defendant; and (3) it is likely, as opposed to merely  
 17 speculative, that the injury will be redressed by a favorable decision.” *Friends of*  
 18 *the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S.  
 19 Ct. 693, 145 L. Ed. 2d 610 (2000); *Bassett v. ABM Parking Servs., Inc.*,  
 20 883 F.3d 776, 779 (9th Cir. 2018). The harm or risk of real harm must actually  
 21 exist and be real, not abstract. *Bassett*, 883 F.3d at 779.

1           *Third*, DCYF has not violated Plaintiffs' free exercise of religion. An  
 2 individual's religious beliefs do not excuse non-compliance with an otherwise  
 3 valid law prohibiting conduct that the government is free to regulate. *Emp't Div.,*  
 4 *Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79, 110 S. Ct. 1595, 108  
 5 L. Ed. 2d 876 (1990); *see Church of the Lukumi Babalu Aye, Inc. v. City of*  
 6 *Hialeah*, 508 U.S. 520, 533-34, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). Laws  
 7 which incidentally burden religion or religious practice are upheld if they are  
 8 valid and neutral laws of general applicability rationally related to a legitimate  
 9 government purpose. *Stormans v. Wiesman (Stormans II)*, 794 F.3d 1064,  
 10 1075-76 (9th Cir. 2015). Non-neutral or non-generally applicable laws are subject  
 11 to strict scrutiny, but otherwise, the laws are reviewed for a rational basis. *Id.* at  
 12 1076.

13           DCYF's policies, generally, and its actions in this case, specifically, are  
 14 neutral because they do not operate as a "covert suppression of particular  
 15 religious beliefs" that were enacted because of, not merely in spite of their  
 16 impacts on a particular religion or religious belief or practice. *Ashcroft v. Iqbal*,  
 17 556 U.S. 662, 676-77, 681, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009);  
 18 *Stormans II*, 794 F.3d at 1077. DCYF's policies apply to all foster parent  
 19 applications equally, and Plaintiffs do not claim otherwise. Instead of burdened,  
 20 their religious beliefs are accommodated.

21           *Fourth*, DCYF's policies do not make any distinctions between religious  
 22

1 faiths. “Evidence of different treatment of unlike groups does not support an  
2 equal protection claim.” *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167-68  
3 (9th Cir. 2005). Plaintiffs’ equal protection claim fails because they improperly  
4 “conflate[e] all persons not injured into a preferred class receiving better  
5 treatment than the plaintiff.” *Id.* at 1167 (internal quotations omitted).

6 In seeking preliminary injunctive relief, a plaintiff must “demonstrate that  
7 irreparable injury is likely in the absence of an injunction.” *Winter*, 555 U.S. at  
8 22. “Speculative injury does not constitute irreparable injury sufficient to warrant  
9 granting a preliminary injunction. A plaintiff must do more than merely allege  
10 imminent harm sufficient to establish standing; a plaintiff must *demonstrate*  
11 immediate threatened injury as a prerequisite to preliminary injunctive relief.”  
12 *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).  
13 Given that Plaintiffs have failed to exhaust their administrative remedies, their  
14 claim of harm is, rather than irreparable, speculative, as the administrative appeal  
15 process provides a forum for addressing whatever harms they claim to have  
16 suffered.

17 *Finally*, it must be observed that the equities weigh heavily against a  
18 preliminary injunction. LGBTQ+ children are greatly overrepresented in foster  
19 care, and are exposed to significantly increased risk of suicide attempts and  
20 thoughts, depression, homelessness, and substance abuse when they do not  
21 receive support from their caregivers. Hunter Decl., ¶¶ 16-21. DCYF’s decision  
22

1 to only license foster parents who can provide safe and affirming homes to  
 2 children who are now or may in the future identify as LGBTQ+ protects children  
 3 from these known harms.

4 **B. Plaintiffs Do Not Have a Constitutional Right to Impose Their**  
 5 **Religious Beliefs on Foster Children**

6 Plaintiffs challenge the application of DCYF Policy 6900, arguing that the  
 7 application of the Policy resulted in an infringement on their right to freely  
 8 exercise their religion and their right to equal protection under the law because  
 9 they had not received a decision about whether their foster care license would be  
 10 approved. Their arguments fail because their foster care license and placement  
 11 approval requests were not denied because of their religion and their right to  
 12 freely exercise their religion was not infringed by a neutral policy.

13 DCYF's denial of Plaintiffs' foster care license application resulted not  
 14 from their religious beliefs, but their stated inability to adequately support a foster  
 15 child, including one who identifies or may identify as LGBTQ+. DCYF has not  
 16 conditioned a foster care license or its approval under the ICPC on Plaintiffs'  
 17 adherence to their own personal religious beliefs, but rather on their inability to  
 18 adequately care for a foster child in their care, including one who is or may  
 19 identify as LGBTQ+.

20 Foster parents do not have free rein with regard to decision-making for  
 21 foster children placed with them. Support for a foster child's current or possible  
 22 future LGBTQ+ identification is but one of the areas foster parents are required

1 to meet the needs of the child in their care, regardless of the foster parents’  
 2 personal beliefs, religious or otherwise. *See* Hunter Decl. ¶¶ 8, 18-20; Sager  
 3 Decl. ¶¶ 10-11; Declaration of Amber Salzer (Salzer Decl.) ¶ 10. Foster parents’  
 4 decision-making regarding children in their care is limited: they may not impose  
 5 their religion on a foster child, Wash. Admin. Code § 110-148-1520(7)-(8);  
 6 McKeown Decl. ¶ 22; Stone Decl. ¶ 5; they must connect a child in their care  
 7 with any necessary medical care and vaccinations regardless of their personal or  
 8 religious beliefs, Wash. Admin. Code §§ 110-148-1550, 110-148-1520(6)-(7);  
 9 Stone Decl. ¶ 5; they may not home school a child in DCYF’s custody, Wash.  
 10 Admin. Code § 110-148-1525; and they may not use corporal punishment, Wash.  
 11 Admin. Code § 110-148-1615.

12 The willingness to support a child who is or may identify as LGBTQ+ is a  
 13 relevant issue, contrary to Plaintiffs’ allegation, because children grow and  
 14 mature while in foster care—their gender identity and sexual orientation emerges  
 15 over time, DCYF cannot predict which children will identify as LGBTQ+, and  
 16 children who identify as LGBTQ+ are at significant risk if they do not receive  
 17 support in their home. Hunter Decl. ¶¶ 17-21; Shogren Decl. ¶¶ 14-15, 17-19;  
 18 Salzer Decl. ¶¶ 13-14; Stone Decl. ¶¶ 8-9. DCYF denied Plaintiffs’ foster care  
 19 application because they will not provide adequate support to a child who  
 20 identifies or may identify as LGBTQ+ in the future, as required under Wash.

1 Admin. Code §§ 110-148-1520 and 110-148-1365. Sager Decl. ¶ 41, Ex. 4  
 2 (license denial letter); *see also* Stone Decl. ¶¶ 10, 14.

3 Plaintiffs are free to exercise their religion; they are not free to impose their  
 4 religion on foster children in their care.

5 Turning to Plaintiffs' claim that their right to freely exercise their religion  
 6 is infringed, DCYF's Policy 6900 is neutral both facially and as applied to  
 7 Plaintiffs because it applies to all foster parent applications regardless of religion.  
 8 Moreover, the Policy meets the requisite rational basis standard of review, as it  
 9 rationally effects the government interests in "providing, and the need to provide,  
 10 foster children a safe and affirming home in order to promote their emotional and  
 11 physical safety and help them thrive." Hunter Decl. ¶ 8. Plaintiffs' free exercise  
 12 claim thus fails.

13 An individual's religious beliefs do not excuse "compliance with an  
 14 otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*,  
 15 494 U.S. at 878-79. Even an incidental burden on a particular religion or practice  
 16 can be upheld if the law is a "valid and neutral law of general applicability" and  
 17 is rationally related to a legitimate government interest. *Stormans II*, 794 F.3d at  
 18 1075-76 (internal quotations omitted); *see Miller v. Reed*, 176 F.3d 1202, 1207  
 19 (9th Cir. 1999) (DMV can require applicant to divulge social security number in  
 20 conflict with plaintiff's religious beliefs). The challenge to Policy 6900 as an  
 21 infringement on the exercise of religion fails for four reasons.



1       First, Policy 6900 is neutral to religion, in both its text and its  
 2 implementation. When evaluating whether a governmental policy is neutral to  
 3 religion, courts examine both the text and operation of the law. *Lukumi*, 508 U.S.  
 4 at 533-34; *Stormans II*, 794 F.3d at 1075-76. A governmental policy is not  
 5 facially neutral when, looking at its language or context, it refers to a religious  
 6 practice without a secular purpose. *Lukumi*, 508 U.S. at 533. A policy operates  
 7 neutrally so long as it does not target a religious tenet or practice while appearing  
 8 neutral on its face. *Id.* at 534. Courts must be “‘reluctant to attribute  
 9 unconstitutional motives’ to government actors in the face of a plausible secular  
 10 purpose.” *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir.1993) (quoting  
 11 *Mueller v. Allen*, 463 U.S. 388, 394-95, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983)).

12       Even a facially neutral governmental policy that disproportionately  
 13 burdens a religious faith does not automatically lose its neutrality. *Stormans II*,  
 14 794 F.3d at 1077. “The Free Exercise Clause is not violated even if a particular  
 15 group, motivated by religion, may be more likely to engage in the proscribed  
 16 conduct.” *Id.* (citing *Reynolds v. United States*, 98 U.S. 145, 166-67,  
 17 25 L. Ed. 244 (1878)). A policy is not neutral if it operates as a “covert  
 18 suppression of particular religious beliefs.” *Lukumi*, 508 U.S. at 520. But a  
 19 plaintiff must show more than “awareness of consequences”; it must prove that  
 20 the law was enacted “because of, not merely in spite of,” its impacts on a  
 21  
 22

1 particular religion or religious belief or practice. *Iqbal*, 556 U.S. at 676-77, 681;  
 2 *Lukumi*, 508 U.S. at 540.

3 DCYF’s Policy 6900’s text is neutral as it does not target a particular  
 4 religion, facially or otherwise. Rather, Policy 6900 “aims to provide guidance to  
 5 DCYF staff on how DCYF expects them to provide services to children and youth  
 6 in the child welfare system who are developing, discovering, or identifying  
 7 themselves as lesbian, gay, bisexual, transgender or questioning (LGBTQ+), and  
 8 provides guidance to DCYF staff to help children receive appropriate and  
 9 culturally responsive services.” Hunter Decl. ¶ 15. Policy 6900 makes no  
 10 reference to any religious practice, conduct, or motivation.

11 *Second*, Policy 6900 operates neutrally. There is no evidence that Policy  
 12 6900 was adopted “because of” the impacts it would have on a particular religious  
 13 belief. *See Iqbal*, 556 U.S. at 676-77 (plaintiff must plead sufficient facts to show  
 14 that the governmental agency adopted and implemented policies for the purpose  
 15 of discriminating on account of religion). Moreover, neither the purposes nor the  
 16 language of Policy 6900 focus on religion—rather, both focus on providing foster  
 17 children who identify, or may identify, as LGBTQ+ with a safe and affirming  
 18 home in order to promote their emotional and physical safety and help them  
 19 thrive.

20 *Third*, Policy 6900 is generally applicable because it does not selectively  
 21 impose “burdens only on conduct motivated by religious belief.” *Lukumi*,

1 508 U.S. at 534. The general applicability inquiry examines whether a  
 2 governmental policy selectively prohibits religiously motivated conduct while  
 3 allowing “substantial, comparable secular conduct” that is just as harmful to the  
 4 law’s purposes. *Stormans II*, 794 F.3d at 1079; *see Lukumi*, 508 U.S. at 543.  
 5 Policy 6900 is generally applicable and contains no exceptions that apply only to  
 6 secular conduct. It applies to DCYF staff members’ interactions with all  
 7 caregivers for foster children and is rationally related to a legitimate  
 8 governmental purpose.

9 *Fourth*, Policy 6900 is a neutral and generally applicable governmental  
 10 policy which must be upheld against Plaintiffs’ free exercise challenge because  
 11 it is “rationally related to a legitimate governmental purpose.” *Stormans II*,  
 12 794 F.3d at 1084. Here, these purposes have been clearly identified: avoiding  
 13 discrimination against children due to their sexual orientation and gender identity  
 14 and maintaining their emotional and physical safety, Shogren Decl. ¶ 20, and they  
 15 are being rationally implemented.

16 This Court should deny Plaintiffs’ request for preliminary injunctive relief  
 17 because they cannot demonstrate that they are likely to prevail on their free  
 18 exercise claim.

19 **C. DCYF Did Not Infringe Plaintiffs’ Right to Equal Protection Under**  
 20 **the Law**

21 Plaintiffs’ equal protection claim fails because all foster care license  
 22 applicants are expected to provide a safe and supportive home for foster children

1 who identify or may identify as LGBTQ+ and they cannot demonstrate that any  
2 similarly situated applicant was treated differently, for at least two reasons.

3 *First*, because DCYF has not deprived Plaintiffs of any right, rational basis  
4 review is appropriate with respect to DCYF’s expectation, set forth in Wash.  
5 Admin. Code § 110-148-1520(6)-(7), that foster parents support foster children  
6 who identify or may identify as LGBTQ+. As Plaintiffs correctly conceded, there  
7 is no right or “entitlement to secure a state license to be a foster parent,” ECF No.  
8 3 at 14, nor do foster parents have a right to care for a particular child. *See H.B.H.*  
9 *v. State*, 192 Wash.2d 154, 167, 429 P.3d 484 (2018) (“foster parents have no  
10 legally recognized parental interest in the children placed in their homes”). As a  
11 matter of state law, a foster care license is not a *right*. The Washington State  
12 Legislature declared that the purpose of the foster care licensing program is, in  
13 part, to “safeguard the health, safety, and well-being of children, . . . *which is*  
14 *paramount over the right of any person to provide care.*” Wash. Rev. Code  
15 §74.15.010(1) (emphasis added). The Legislature further declared that  
16 “Washington has a compelling interest in protecting and promoting the health,  
17 welfare, and safety of children[.] . . . [and] no person or agency has a right to be  
18 licensed under this chapter to provide care for children.” 1995 Wash. Sess. Laws  
19 of 1995, 1271-1280.

20 The extensive relevant data and research reviewed by DCYF confirmed  
21 that children who identify as LGBTQ+ are overrepresented in foster care, a  
22

1 child's identity emerges over time, and children who may identify as LGBTQ+  
 2 require a safe and supportive placement in order to maintain their emotional and  
 3 physical safety. Hunter Decl. ¶¶ 16-21; Shogren Decl. ¶¶ 12-18. As a result,  
 4 DCYF justifiably conditions foster care licensure on a foster care applicant's  
 5 willingness to provide a safe, supportive, and affirming home to foster children  
 6 who identify or may identify as LGBTQ+. Wash. Admin. Code  
 7 § 110-148-1520(6)-(7); Hunter Decl. ¶ 21. This basis satisfies rational basis  
 8 review.

9 *Second*, children in foster care have competing substantive due process  
 10 rights to be free from unreasonable risk of harm and to have their basic needs  
 11 met. *See, e.g., Tamas v. Dep't of Soc. and Health Servs.*, 630 F.3d 833, 842 (9th  
 12 Cir. 2010) ("The Fourteenth Amendment substantive due process clause protects  
 13 a foster child's liberty interest in social worker supervision and protection from  
 14 harm inflicted by a foster parent."); *Braam ex rel. Braam v. State*,  
 15 150 Wash.2d 689, 698-99, 81 P.3d 851 (2003). Protecting children from harm or  
 16 the risk of harm is a compelling state interest. *See Custody of Smith*,  
 17 137 Wash.2d 1, 18, 969 P.2d 21 (1998). Requiring foster parents to provide a safe  
 18 and supportive home to foster children who identify or may identify as LGBTQ+  
 19 is a narrowly tailored solution that does not infringe upon Plaintiffs' religious  
 20 freedom and, therefore, survives both rational basis review as well as strict  
 21 scrutiny.

1 **IV. CONCLUSION**

2 It is respectfully requested, therefore, that this Court deny Plaintiffs'  
3 Motion for Preliminary and Permanent Injunction.

4 DATED this 22nd day of June 2020.

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6 Attorney General

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury of the laws of the state of Washington that on June 22, 2020, I caused Defendant's Response to Plaintiffs' Motion for Preliminary and Permanent Injunction to be electronically filed with the Clerk of the Court using the CM/ECF System, which will automatically generate a Notice of Electronic Filing (NEF) to all Parties in this action who are registered users of the CM/ECF System. The NEF for the foregoing specifically identifies recipients of electronic notice.

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